

NOV 22 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1975

NO. 75-5792

THOMAS LEE KING AND JOSEPH LEE KING, Petitioners

VS.

THE STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF
NORTH CAROLINA, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS,
AND AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

Frank Patton Cooke
Commercial Building
Gastonia, North Carolina
28052
(704) 864-4354

Robert H. Forbes
Commercial Building
Gastonia, North Carolina
28052
(704) 864-7281

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SUPREME COURT OF THE UNITED STATES
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NO.

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VS.

THE STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on June 26, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina was rendered and filed on June 26, 1975, bearing Opinion Number 8 and reported in 215 S.E.2d 540. A copy of the opinion is hereto attached and made a part of this Petition.

JURISDICTION

The opinion of the Supreme Court of North Carolina above referred to was entered and certified in the Superior Court of Gaston County, North Carolina, on July 7, 1975, and an Order for Stay of Execution was entered on July 10, 1975, and executed by the Honorable Susie Sharp, Chief Justice of the Supreme Court of North Carolina, which Stay of Execution is hereto attached and made a part of this Petition. The Stay of Execution was granted pending the determination of this Petition for Writ of Certiorari to the United States Supreme Court.

An Application for Extension of Time Within Which to File a Petition for Writ of Certiorari was filed in the United States Supreme Court, and an Order granting this extension of time was executed by the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, on September 26, 1975, which Order is hereto attached and made a part of this Petition.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Have the petitioners been deprived of their constitutional right to be free from the infliction of cruel and unusual punishments, in violation of the Eighth Amendment to the Constitution of the United States by virtue of the Supreme Court of North Carolina's interpretation of §14-17 of the North Carolina General Statutes after the decision of the Supreme Court of the United States in the case of Furman v. Georgia, 408 U.S. 238?
2. Have the petitioners been deprived of their constitutional right to be free from the infliction of cruel and unusual punishments, in violation of the Eighth Amendment to the Constitution of the United States by virtue of their being sentenced to death under the North Carolina General Statutes §14-17?
3. Have the petitioners been deprived of their constitutional right of due process of law, in violation of the Fifth Amendment of the Constitution of the United States by virtue of the consolidation for trial of the charges against petitioner Thomas Lee King with those against Joseph Lee King?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury,

except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

1. The North Carolina General Statutes §14-17 prior to its amendment, which was effective April 8, 1974:

Murder in the first and second degree defined; punishment - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison and the Court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

2. The North Carolina General Statutes §15-152: (1965)

Separate counts; consolidation. - When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses.

STATEMENT OF THE CASE

The petitioners, Thomas Lee King and Joseph Lee King, were tried before the Honorable Fred Hasty and a jury at the July 15, 1974, criminal session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District of North Carolina, upon indictments charging each of them with robbery with a dangerous weapon and first degree murder of Leo Davis, both offenses occurring on or about the 16th day of February, 1974. The petitioners, and each of them, entered a plea of not guilty to each charge. The jury on the 31st day of July, 1974, returned verdicts of guilty in all four cases. The Court sentenced both defendants to death by the inhalation of lethal gas in the case against them charging them with first degree ^{murder}, and imposed no judgment in the cases of armed robbery. Both defendants gave notice of appeal and the Supreme Court of North Carolina upheld the convictions. Both the State and the petitioner Thomas Lee King presented evidence in the case and the record of the trial in two volumes consists of 621 pages.

Prior to the trial on July 15, 1974, an Order was signed by the Honorable William T. Grist during the June 13, 1974, session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District regarding the release of the petitioners on bail. (R 26, 27). Both of the petitioners were denied release on bond, but in this Order Judge Grist stated, "That the State has indicated that there will probably not proceed in both cases at the same term and counsel for the defendant Joe King, Mr. Robert H. Forbes, has indicated he would likewise move that the matters not be consolidated for trial". (R 27). Upon this premise, the defense attorneys for the petitioners prepared their separate defenses. On July 15, 1974, after arraignment and after plea, Judge Hasty ordered that the petitioners, Thomas Lee King and Joseph Lee King, would be tried together. A Motion had been filed by Attorney Robert H. Forbes on behalf of Joseph Lee King for a severance of the trials. (R 28, 29). This Motion was denied and the

State proceeded with the trial of all four cases during the July 15, 1974, session of Superior Court.

The evidence presented by the State and by the petitioners is summarized in the attached Opinion handed down by the Supreme Court of the State of North Carolina on June 26, 1975. After the close of the evidence, guilty verdicts were returned against both petitioners. The attorneys for both of the petitioners each made motions to set the verdicts aside and motions for mistrials based in part on the fact that the two cases were consolidated for trial over the objections of both defendants. These motions were denied. (R 574, 575).

Notices of intention to appeal from the verdicts and rulings of the Trial Judge were served on the State of North Carolina on the 1st day of August, 1974. (R 43, 44). Both petitioners were allowed to appeal to the Supreme Court of the State of North Carolina as indigents. The petitioners are still in an indigent state and respectfully move the Supreme Court of the United States to accept this Petition in that form, and in support of this the petitioners attach a written Motion and an Affidavit of Indigency pursuant to Rule 53 of the Supreme Court Rules.

The petitioners' convictions and each sentences were affirmed by the Supreme Court of the State of North Carolina in an Opinion filed on June 26, 1975, with three of the justices dissenting as to the death penalty.

REASONS FOR GRANTING THE WRIT

It is submitted that the Supreme Court of North Carolina has decided constitutional questions in this case contrary to the Constitution of the United States and contrary to the applicable decisions of this Court which deny the petitioners fundamental constitutional rights to due process and freedom from the infliction of cruel and unusual punishment. In particular, the North Carolina Supreme Court's ruling in this case misapplies this Court's holding

in the case of Furman v. Georgia, 408 U.S. 238 (1972) and further imposes the death penalty which, it is submitted, is proscribed by the Eighth Amendment to the United States Constitution. The constitutional questions raised in this case are of broad and fundamental importance, not only to the petitioners themselves, but to others similarly situated who have had to or will be required to stand trial for capital offenses, and most particularly to those versus North Carolina required to stand trial for capital offenses subsequent to the Furman decision of this Court and its interpretation in North Carolina.

In the case of State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973), the Supreme Court of North Carolina was required to apply the principles of Furman v. Georgia to the North Carolina Capital Crime Statute, in this case more particularly North Carolina General Statute §14-17. In its decision a bare majority of the seven member Court interpreted Furman to invalidate the portion of the statute which enabled the jury to fix punishment at life imprisonment in its discretion. As a result of this decision, the North Carolina Supreme Court interpreted the statute to provide unconditionally for punishment by death upon conviction of the crime.

At the time the Waddell decision was rendered, the North Carolina General Assembly had not modified the existing statute, North Carolina General Statute §14-17, but subsequent to the decision in Waddell and other cases following Waddell, the North Carolina General Statutes were amended by the legislature effective April 8, 1974, to eliminate that portion of North Carolina General Statute §14-17 enabling the jury in its discretion to fix punishment as life imprisonment. Between the date of the legislative enactment and the decision in Waddell which was rendered on January 18, 1973, numerous cases were decided and in particular your petitioners' cases were decided. The crimes for which your petitioners were convicted occurred on or about the 16th day of February, 1974, a date prior to the modification by the North Carolina legislature.

Your petitioners contend that the North Carolina Supreme Court's interpretation of the Furman decision is erroneous. It is submitted that, as pointed out by Chief Justice Bobbitt of the North Carolina Supreme Court in a later dissenting opinion in State v. Jarrette, 284 N.C. 625; 202 S.E. 2d 721 (1974), "the impact of Furman upon our statutes is to prohibit, not to require to permit the imposition of the death sentences until such time as our statutes are amended by the General Assembly" (at 748). In the Jarrette case Chief Justice Bobbitt argued, for a three member minority, again quoting his dissent in the Waddell case, saying:

I do not think any death sentence may be constitutionally inflicted unless our General Assembly strikes from our present statute the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion this Court has no right to ignore, delete or repeal these provisions which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. Furman did not repeal them. This Court has no right to repeal them. (at 31).

The petitioners contend that the only proper course for the North Carolina Supreme Court and its only proper interpretation of Furman would have been to forbid the imposition and execution of the death penalty and to follow a policy of judicial restraint. It is the responsibility of the legislature and not the State Supreme Court to establish a scheme of sanctions for criminal acts, but the interpretation given in Waddell by the bare majority, which interpretation was followed in this case, did in fact establish a scheme for sanctions for criminal acts. As the Opinion of the North Carolina Supreme Court in the instant case stated, the only permissible course for the North Carolina Court to take in this cause would have been to vacate the death sentences in the petitioners' cases and to remand for pronouncement of judgments of life imprisonment.

The petitioners further contend that their rights under the Fifth Amendment of the Constitution of the United States to due process of law were

violated, in that the Trial Court consolidated the cases for trial against both of the petitioners. Under §15-152 of the General Statutes of North Carolina the consolidation for trial of two defendants charged with the same offenses is not expressly authorized, but unquestionably this statute has been interpreted many times to permit such consolidation. However, it has been repeatedly held that the matter of consolidation or severance is a discretionary matter for the Trial Court. State v. Dawson, 281 N.C. 645, 190 S.E. 2d 196 (1972). This discretion should not be an unbridled one and the United States Supreme Court held in the case of Bruton v. United States, 391 U.S. 123, that this consolidation practice is limited in the area where one defendant has made inculpatory statements of the other. The North Carolina Courts have seemed to recognize the need for separate trials where the defenses of the defendants charges are antagonistic to each other. State v. Cotton, 218 N.C. 577, 12 S.E. 2d 246 (1940). Although language to this effect does not appear in any of the decisions noted by the petitioners, they contend that it would not be an improper statement of the rules to conclude that although consolidation or severance is a discretionary matter for the Trial Court, discretion should be exercised in favor of severance under circumstances in which each defendant may have a fair trial only if he be tried alone. The petitioners assert that in the instant case fundamental fairness required that they should have been granted a trial separate and apart from each other. It was the understanding of the petitioners that in the case at hand they were to be tried on separate occasions and the wording of the Order entered at the bail hearing on June 13, 1974, and signed by the Honorable Judge William T. Grist, who presided over the June, 1974, criminal session of the Superior Court for Gaston County, North Carolina, (R 27) seemed to indicate that the State would be required to elect as to which case would be tried first and that case would be placed on the calendar for trial in Gaston County during the July 15, 1974, term. Both of the petitioners

based their defenses on the fact that the cases were to be severed for trial. The petitioners contended to the North Carolina Supreme Court that the Order of the Honorable Judge Fred Hasty consolidating for trial the cases of the petitioners amounted to an overruling of an Order of another Superior Court Judge, which in and of itself constitutes prejudicial error. The Supreme Court of North Carolina did not rule in favor of this premise. Because the cases were consolidated for trial a great deal of prejudice existed to both of the petitioners throughout; for example, the repetition of the name King during the trial, whether referring to Joseph or Thomas Lee, must have had a cumulative effect upon the jury. Furthermore, the fact that the petitioners were father and son must have tied the two together in the minds of the jury to some extent. There were a number of more concrete matters resulting in prejudice to the petitioners connected with consolidation. The petitioner Thomas Lee King contends that he was prejudiced by the identification by one of the witnesses of Joseph King because of the tattoos on his hand, as well as the clothing he wore. Further, there was evidence admitted against Joseph King concerning blood type stains on his clothing which would not have been admissible as evidence against Thomas King in a separate trial. Also, there was evidence admitted against Thomas Lee King that could have had a prejudicial effect on the jury against his father, Joseph King; for example, the State contended that fingerprints found in the home of the deceased belonged to the petitioner Thomas Lee King. This evidence would not have been admissible against Joseph Lee King had he been tried separately and certainly could not have prejudiced the jury's minds against him had it not been admitted. In a sense, the defenses of the two petitioners were antagonistic to each other. Obviously, attorneys for both of the petitioners thought so and they depended on the fact that the trial would be held separately in preparation of their cases. The petitioner Thomas Lee King contends that he was damaged in his defense of the charges against him by the failure of his father, the co-petitioner, to

take the witness stand and deny the charges against him. Although the North Carolina Supreme Court has held that this factor alone is not sufficient to entitle a defendant to a new trial, in the instant case, however, taken into consideration with all of the other factors as set forth above, it prevented the petitioner Thomas Lee King from having a fair trial.

As a final argument, the petitioners contend that their Eighth Amendment rights to be free from the infliction of cruel and unusual punishment were violated by the State of North Carolina imposing the death penalty upon them. Although Furman v. Georgia does not specifically hold that capital punishment is prohibited by the Eight Amendment, Justice Brennan in his opinion filed in the Furman case points out that "no other existing punishment is comparable to death in terms of physical and mental suffering". (at 288). It is agreed by all of the justices in the opinions filed in Furman that in order to determine whether or not a punishment would be cruel and unusual within the meaning of the Eighth Amendment itself must be analyzed, keeping in mind the standards of decency and human respect in the present society. The petitioners contend that in this society there is no place for capital punishment because it is excessive and also because it is offensive to the moral standards that exist in this society. For these reasons no state through its legislative process should be allowed to inflict a death penalty upon someone as punishment for committing a crime because this would be contradictory to the principles propounded in the Eighth Amendment under an interpretation that should be given the Eighth Amendment by today's standards.

CONCLUSION

For the foregoing reasons, the petitioners pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

CERTIFICATE

I HEREBY CERTIFY THAT I HAVE READ THE FOREGOING READINGS
AND THAT I AM FAMILIAR WITH THE CASE TO
THE BEST OF MY KNOWLEDGE AND AM SENDING A COPY OF
THE SAME TO THE ATTORNEY FOR THE DEFENDANT AND OPPOSITE

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

20th Nov. 25.

FRANK PATTON COOKE
BY Frank P. Cooke; Robert H. Forbes
ATTORNEY FOR DEFENDANT

Frank Patton Cooke
Frank Patton Cooke

Commercial Building
Gastonia, North Carolina 28052
(704) 864-4354

Robert H. Forbes
Robert H. Forbes
Commercial Building
Gastonia, North Carolina 28052
(704) 864-7281

common jail of Gaston County without the benefit of bond, charged with the murder of Leo Davis and with the armed robbery of the said Leo Davis, alleged to have occurred on February 16, 1974. That your petitioner is not guilty;

(3) That your petitioner has been lodged in the common jail of Gaston County since February 20, 1974, without the benefit of bail. That these cases were scheduled for trial on June 10, 1974, but were continued by the State for reasons unknown to your petitioner;

WHEREFORE, your petitioner respectfully moves the Court that a reasonable bail bond be allowed in the fair administration of justice, and for such other and further relief as to the Court may seem just and proper.

s/ FRANK P. COOKE
Attorney for the Defendant

(Verified by THOMAS LEE KING this the 11th day of June, 1974.)

ORDER RE: BAIL (BOTH DEFENDANTS)

THIS MATTER coming on to be heard and being heard before the undersigned judge presiding over the June 10, 1974 Criminal Session of Superior Court for Gaston County upon a motion of the defendants, Thomas Lee King and Joe King, through their attorneys, Frank P. Cooke, and Robert H. Forbes, respectively, for the purpose of considering a bond for the defendants who are charged with First Degree Murder and Armed Robbery.

The Court having considered the matter for some three hours and having heard a number of witnesses both for the defendants and the State, is of the opinion that the motion for allowance of a bond as to each of the defendants should be and the same is hereby DENIED.

That the matter is ordered held for further consideration in the event that the cases are unable to be heard as hereafter set forth.

That the State has indicated that there will probably not proceed in both cases at the same term and counsel for the defendant, Joe King, Mr. Robert H. Forbes, has indicated he would likewise move that the matters not be consolidated for trial.

It further appears to the Court that the cases were calendared for trial during the week of June 10, 1974, and that the defendants were ready for trial and that it became necessary that the State move for a continuance because of the absence of private prosecution, Mr. Gady B. Stott, and the Court having considered the motion for a bond as a further motion for a speedy trial;

THE COURT ORDERS that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Gaston County on July 15, 1974.

(That counsel for both defendants have indicated in open Court that they are ready for trial and do not perceive at this time any motions which they contemplate filing which would delay the trial of the cases.)

IT IS FURTHER ORDERED that a copy of this order be sent to counsel for the defendants, Frank P. Cooke and Robert H. Forbes; and to the Solicitor for the State.

IT IS FURTHER ORDERED that a Transcript of this hearing be prepared (original and one copy) at State expense.

This the 13th day of June, 1974.

s/ WILLIAM T. GRIST
Judge Presiding

=====

ORDER OF GRIST, J. (THOMAS LEE KING) (Filed July 25, 1974)

THIS CAUSE coming on to be heard and being heard before the undersigned Regular Judge assigned to hold the Courts of the 27th Judicial District, upon motion of the defendant, through his attorney, Frank P. Cooke, that the defendant be permitted to accompany the attorney to various places to assist counsel in the preparation of his defense;

And it further appearing to the Court that the defendant is confined in the common jail of Gaston County, without bond;

And it further appearing to the Court that it would be in the fair administration of justice that the defendant be permitted to accompany counsel or his agent at various times and places, in order to prepare his defense;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Sheriff of Gaston County be, and he is hereby ordered, to permit the defendant to accompany his attorney, or the attorney's agent, to such places at such times as the attorney, Frank P. Cooke, may request; provided that at all times the Sheriff or his deputy shall remain with and keep the defendant in custody during such times that he accompanies his attorney or the agent of the attorney.

This the 25th day of June, 1974.

s/ WILLIAM T. GRIST
Judge Presiding

=====

MOTION (JOSEPH LEE KING) (Filed July 9, 1974)

NOW COMES the defendant, Joseph Lee King, through his attorney, Robert H. Forbes, and respectfully moves the court in the above captioned matter for an Order granting the de-

fendant, Joseph Lee King, a severance from all other defendants in the above captioned cases on the grounds that the defendants, Joseph Lee King and Thomas Lee King would be prejudiced by the joinder, both of offenses and defendants, in the above captioned matter.

After reviewing all of the evidence which has been submitted to the defendant's attorney by the State and after reviewing all the transcript of the hearing held in Superior Court on June 13, 1974, counsel is of the opinion that this defendant could not receive a fair trial if he is required to go to trial in these cases against him with the co-defendant, Thomas Lee King, as certain evidence for the State against Thomas Lee King would be prejudicial to the defendant, Joseph Lee King and the defendant's counsel is informed and believes, and therefore alleges that the defense of each of the defendants would be different and each defense could prejudice the other defendant.

Because of the nature of the cases pending against the defendant, the complexity of the cases, defendant alleges that the right to have his case judged separately would be seriously prejudiced if the cases were tried together.

For the foregoing reasons, counsel believes that in the interest of justice, there should be a severance of these cases from the cases against the co-defendant, Thomas Lee King.

WHEREFORE, the defendant, through his counsel, respectfully requests that such severance for which no previous application has been made, be granted.

This the 9 day of July, 1974.

s/ ROBERT H. FORBES
Attorney for Defendant

=====

THE CLERK: Edwin Miller Your foreman has reported to the Court a verdict of guilty of murder in the first degree in Case No. 74 CR 4358 as to the defendant, Joseph King. Was this your verdict?

JUROR: Yes.

THE CLERK: Is this now your verdict?

JUROR: Yes.

THE CLERK: Do you still agree and assent thereto?

JUROR: Yes.

THE CLERK: You have found the defendant, Joseph King, guilty of murder in the first degree. This is your verdict, so say you all.

JURORS: Yes, (in unison)

THE COURT: You say your client wants to say something, Mr. Cooke.

MR. COOKE: I want to make a motion. If it please the Court, the defendant moves to set aside the verdicts of the jury in both cases; the robbery with a dangerous weapon and the murder charge. He also makes motions for mistrials in each case for errors committed during the course of the trial. In support of his motions to set aside the verdict, may it please the Court, the defendant contends that he did not get a fair trial based upon the fact that these two cases were consolidated for trial over the objections of the defendant. I think there can be no question, at least in my mind, that this defendant saddled with the co-defendant, Joe King, had an insurmountable burden to carry. Of course, I am aware of the present rulings of our highest Court with regard to discretionary power of His Honor in consolidating the cases for trial. However, as it was argued before the consolidation and on the motion against consolidation, this defendant plead not guilty, but he offered no evidence. (Mr. Cooke continues to argue motion.)

MR. FORBES: If it please the Court, on behalf of the defendant, Joseph King, we would make the same motion on principally the same grounds. I would just like to say this. Your Honor recalls prior to the commencement of this trial, on behalf of Joseph King, we asked for a separate trial because at that time we were well aware of the evidence involved in this case and well aware that there were two separate defenses involved in trying to defend these two defendants and that the defense, by combining the two of them, during the course of the trial, would in effect work against each other. (Mr. Forbes continues to argue motion.) We argue and contend that the defendant, Joe King, is entitled to a declaration by the Court of a mistrial principally on the basis that there was a consolidation of the cases, rather than a separate trial.

MR. COOKE: We also move that the charge of robbery with a dangerous weapon be arrested and the verdict be set aside and cite to His Honor State vs. Carroll and Stewart decided by the Supreme Court of North Carolina on December 13, 1972, and contained in Volume 282 at Page 326. The Supreme Court held that where a defendant is convicted of both the robbery and the murder that the lesser merges into the greater.

THE COURT: Each of the motions of the defendants are OVERRULED or DENIED.

DEFENDANT THOMAS LEE KING'S EXCEPTION NO.
129.

DEFENDANT JOSEPH KING'S EXCEPTION NO. 111.

MR. COOKE: Does that include the argument under the State vs. Carroll?

THE COURT: I'll take that into consideration in my judgments.

THE COURT: Now, in the first case, 74 CR 4357, Thomas Lee King, please stand. (Defendant Thomas Lee King stands.)

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same time the jury in case No. 74CR4358 re-turned a verdict of guilty of murder in the first degree.

It appears to the Court that the commission of the robbery with a dangerous weapon was an essential element in the State's proof of murder in the first degree under the felony-murder doctrine and became a part of and was merged into the murder charge.

The Court, therefore, determines that no judgment may be entered in this case imposing punishment.

IT IS SO ORDERED.

This 1st day of August, 1974.

s/ FRED H. HASTY
Judge Presiding at the July 15,
1974 Criminal Session Extended

Reevd - Ernest D. McClude D/S 8/1/74

APPEAL ENTRIES (THOMAS LEE KING)

In apt time, the defendant objects and excepts to the rulings and the foregoing attached judgment of the Court and gives notice of appeal to the Supreme Court of North Carolina.

Further Notice waived.

The defendant is allowed 90 days to prepare and serve case on appeal, and the State is allowed 30 days after such service to prepare and serve countercase.

~~Appeal-bond-is-set-at-\$~~ Defendant having been found indigent no appeal bond required.

This the 1 day of Aug 1974.

-44-

s/ FRED H. HASTY
Presiding Judge

APPEAL ENTRIES (JOSEPH KING)

In apt time, the defendant objects and excepts to the rulings and the foregoing attached judgment of the court and gives Notice of Appeal to the Supreme Court of North Carolina.

Further Notice waived.

The defendant is allowed 90 days to prepare and serve case on appeal, and the State is allowed 30 days after such service to prepare and serve countercase.

Appeal bond is set at \$ Indigent - No bond required.

This the 1 day of Aug, 19__.

s/ FRED H. HASTY
Presiding Judge

MOTION TO ENLARGE TIME FOR DOCKETING RECORD ON APPEAL AND TO PREPARE AND SERVE CASE ON APPEAL (THOMAS LEE KING) (Filed Oct 29, 1974)

TO THE HONORABLE FRED H. HASTY, JUDGE OF THE SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE FOR GASTON COUNTY, GREETING:

NOW COMES the defendant and respectfully moves the Court that time be extended or enlarged within which to docket the Record on Appeal and to prepare and serve the Case on Appeal, and in support of these motions shows unto the Court the following:

(1) That the defendant was tried and convicted at the July 15, 1974, Criminal Session

SUPREME COURT OF NORTH CAROLINA

TERM, 19 75

TE OF NORTH CAROLINA

vs.

R. L. K. v. J. L. K.	
No. 4-75	
1. OUGHTON 2. LEE, JR., JAMES 3. CLERK OF SUPERIOR COURT	No. 8

Spring

Gaston

County

MAS LEE KING and JOSEPH LEE KING

is cause came on to be argued upon the transcript of the record from the Superior Court ... Gaston ... County:
 consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.
 is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the
 Justice, be certified to the said Superior Court, to the intent that the
 PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

is considered and adjudged further, that the DEFENDANTS DO PAY

the costs of the appeal in this Court incurred, to wit, the sum of

*****FORTY-TWO AND 00/100*****

dollars (\$ 42.00)

cution issue therefor. Certified to Superior Court this 7th day of July 19 75.

E COPY

al Printing Co., Raleigh, N. C.

ADRIAN J. NEWTON

By: Adrian J. Newton
Clerk of the Supreme Court.
Deputy Clerk

STATE OF NORTH CAROLINA

v.

No. 8 - Gaston

THOMAS LEE KING and
JOSEPH KING

Appeal by defendants pursuant to G.S. 7A-27(a) from Nasty, J., at the 15 July 1974 Session of Gaston Superior Court.

On indictments proper in form, defendants were convicted of robbery with a dangerous weapon and first degree murder. The trial judge ruled that the act of robbery with a dangerous weapon was an essential element of the State's proof of murder in the first degree and that the robbery charges merged into the murder charges. Judgments imposing the death penalty as to each defendant were entered on the first degree murder convictions.

The trial of these cases began on 15 July 1974 and ended on 31 July 1974. The record of the trial, in two volumes, consists of 621 pages. For this reason our summary of the evidence, in order to be fair to both the State and defendants, of necessity is given in some detail.

The State's evidence is summarized as follows: On Saturday night, 16 February 1974, Mr. Leo Davis, age 72, and his wife Missouri Davis, age 65, were living in their five-room brick home at 402 North Pine Street in Gastonia where they had lived for thirty-three years. They retired for the evening about 9:00 p.m. At approximately 11:00 or 11:30 p.m., the doorbell rang and Mr. Davis went to the door and opened it. Mrs. Davis followed her husband to the door because she knew he did not see well. The two defendants entered through the opened door and Thomas King told Mr. Davis, who bought and sold guns, that he wanted to see one of his rifles. Joseph King, father of Thomas King, took a seat in the den on a couch about two or three

feet from where Mrs. Davis was sitting in a chair. Thomas looked at the rifle and then gave it back to Mr. Davis. As Mr. Davis turned to replace the rifle on the rack, Thomas "reached in his pocket and got something and hit [Mr. Davis] in the head with it." Mrs. Davis then hit Thomas in the back with her fist, saying, "Don't you hit him like that." At that point, Joseph hit Mrs. Davis from behind with a hammer and "chint the top of [her] head off." Mrs. Davis observed Thomas place his hands around her husband's neck as Joseph dragged her into the bedroom, pushed her onto the floor, hit her with the hammer, and stabbed her five times in the chest. When Joseph dropped the hammer, she picked it up and hit him several times with it. Soon thereafter, Thomas entered and demanded money, and Mrs. Davis opened the safe in the bedroom for them. Finding no money there, defendants again demanded money, whereupon she gave them \$10 from her pocketbook. Defendants then tied Mrs. Davis with a sheet, cut the cord to the telephone, and left. When Mrs. Davis untied herself, she saw her husband's lifeless body lying in the den. She then went to a neighbor's and called the police. She was taken by ambulance to Gaston Memorial Hospital and soon after to Charlotte Memorial Hospital where she remained for approximately two weeks.

Mrs. Davis further testified that a metal box containing over \$300 in half-dollars and quarters was missing from her safe after the robbery. She did not see anyone remove the box from the safe but she had seen it there when she opened the safe. Thomas was wearing a white shirt with light blue pants and Joseph was wearing dark clothes and a yarn cap on the night in question. The face of neither was covered in any way. Mrs. Davis noticed a scar or laceration on Thomas's lip. When the two men entered her home on the night of 16 February 1974, she was of the opinion, judging from the tone of the conversation, that her husband knew these men. She later remembered Joseph from his having lived in that neighborhood ten to twelve years

earlier, although she had not known Thomas during that period.

Mrs. Davis selected the pictures of both defendants from photographic lineups as being the men who had committed these crimes.

Donald Robinson, a driver employed by Yellow Cab Company, received a call about 1:00 a.m. on 17 February 1974 to go to Circle View Drive in Gastonia. There he picked up the two defendants. Thomas entered the front seat and Joseph entered the back seat. Thomas was wearing light blue pants and a dark blue "dress-type" coat. The pants had a heavy stain on the right leg. Joseph's face and head were scratched and bloody. They told Robinson "something about being in a power camp and [getting] in a fight." Thomas referred to Joseph as "something like 'Pappy'." Robinson let them out at House's Superette on the corner of Wilkinson Boulevard and West Club Circle about three miles from where he picked them up. Thomas paid the \$1.75 fare in coins, "mostly quarters."

Mrs. Brenda Lowrance testified that between 12:40 and 12:50 a.m. on 17 February 1974, defendant Thomas King came to her door on Circle View Drive in Gastonia and asked to use a telephone to call a cab. Thereupon, Mrs. Lowrance called a cab for him. Mrs. Lowrance lives about three-fourths of a mile from the Davis residence.

Charles Poffner of the Gastonia Police Department testified that while investigating this case in the early afternoon of 17 February, he found a hammer under a large truck 300 feet from the Davis residence. The residence itself was in general disarray, and there were brownish red stains throughout.

Marvin Barlow of the Gastonia Police Department testified that a small metal box was found at the Davis residence immediately outside the bedroom door. From this box three latent fingerprints were lifted and these were later identified by expert witnesses as belonging to Thomas King.

At about 7:30 a.m. on 17 February 1974, Gastonia police officers arrested Joseph King at his home at 137 West Club Circle.

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triv. During a lawful search of the premises, officers discovered on the living room couch a dirty blue jacket that had stains on the left shoulder.

Miss Laura Ward, a forensic serologist with the State Bureau of Investigation, testified that tests made on the coat found at Joseph King's residence on 19 February 1974 revealed the presence of human blood stains. Some of these stains were group "O" and some were group "A". An examination of the hammer in evidence revealed human blood stains of group "O". Miss Ward tested Joseph's blood and found it to be group "A". Mrs. Davis' blood was found to be group "O".

There was medical testimony to the effect that Leo Davis died as a result of asphyxiation due to manual strangulation.

Defendants' evidence is summarized as follows: When Joseph King was arrested on the morning of 19 February, it appeared to officers he had not shaved for several days. Joseph was cooperative with officers, and explained to them that scratches and a bruise on his head were caused when he hit his head on a rusty nail in the basement of his house. He further told officers that although he knew Mr. Davis he had not seen him since he moved ten years ago from the neighborhood where the Davises live. Joseph King did not testify at trial.

Defendant Thomas King testified that he was 23 years old and that he knew Mr. and Mrs. Davis because as a teenager he did yard work for them over a period of about two years. At about 2:30 or 3:00 p.m. on 16 February 1974, he went to Charlotte with a friend named Ronald Bridges to shoot pool at a place called Smitty's. He was wearing a dark blue jacket and burgundy pants and at no time that night was he wearing blue pants. He left Smitty's about 8:00 or 8:30 p.m. and returned home to Camerica. He went to the home of his in-laws because he was unable to get heating oil for his house. There,

he had a late supper and made arrangements to have his wife and children stay there for the night. He called his parents' home to arrange to sleep there for the night because there was not enough room for him at the home of his in-laws. Then he called there, his father Joseph King was intoxicated. He then left to go a couple of blocks to a package store to get a six-pack of beer. He planned to catch a ride from there to his parents' house. While thumbing a ride to the package store, he caught a ride with a man who said he was going to Charlotte to shoot pool. Thomas decided to go to Charlotte with this man, and was let out at the Little Rock Caf Lounge, in Charlotte between 10:00 and 11:00 p.m. There he saw a waitress named Debbie, Jeff Anderson, Lindsey Caldwell, and a girl whose nickname was "Sam." Of those, only "Sam" testified at trial. He shot pool at the Little Rock Caf Lounge until 12:00 or 12:15 a.m. At that point, he caught a ride with a man named Bill Patrick whom he had never seen before. Bill Patrick did not testify at trial.

Upon entering Gastonia, Bill Patrick's 1969 Chevelle had a flat tire. This occurred about 12:45 or 1:00 a.m. Patrick did not have a spare tire so he and Thomas walked to the Lowrance residence nearby, knocked on the door, and asked the lady who answered the door to call a car for them. Thomas told Patrick to come with him to his father's house and they would make arrangements for Patrick's car. Thomas told the car driver to stop at Houser's Superette because he wanted to make a purchase. There, he and Bill Patrick left the cab and he paid the driver \$1.75 with quarters he had gotten at the pool hall. There was no blood on the clothing of either defendant or Bill Patrick. Bill Patrick went to a pay phone booth and defendant went inside the superette and purchased a fifth of wine. After buying the wine, defendant and Bill Patrick parted and defendant walked the short distance to his parents' house. He entered the house about 1:10 or 1:20 a.m. and observed his father "passed out" on the couch.

in the living room. Thomas continued to the bedroom, got into bed, and began to read. His father awoke and entered the bedroom, and he and Thomas began struggling for the wine. Joseph, who was intoxicated, hit Thomas in the nose and Thomas retaliated with blows to the face which caused Joseph to hit his head on the door facing. Thomas then gave his father the bottle of wine and his father returned to the couch.

Thomas further testified that he was employed in the business of selling baby pictures and had been so employed for more than four years. His income for 1973 was between \$10,000 and \$11,000. He denied going to the Davis residence on 16 February 1974 and denied that he ever had a scar or any sort of laceration on his lip. He further denied that he changed clothes on 16 February 1974 or that he had blood on his trousers at any time during that period. Thomas stated that he has never referred to his father as "Pappy" or "Pop" in his life. He also denied that the fingerprints found on the metal box were his.

Ronald Lee Bridges testified that on the afternoon of 16 February 1974 he and Thomas shot pool together at Smitty's in Charlotte until about 8:00 or 8:15 p.m. Defendant had on deep red pants at that time.

David Timothy Messick testified that Thomas King's general reputation is good. He and Thomas cleaned up the Davis yard together on one occasion when they were younger. On cross-examination, Messick testified that the two boys were twelve or thirteen years of age when they did this.

Jimmy Johnson testified that he saw Thomas King and another boy cut the Davis yard on several occasions when Thomas was about sixteen years of age.

Eight witnesses, including Thomas's employer, testified that Thomas's character and general reputation were good.

Alvin Leon Carr testified that about 10:45 p.m. "on a Saturday about five or six months ago" he saw Thomas at the Little Rock Cue Lounge. Carr did not remember the date or anything about what Thomas was wearing at the time. He did not see a woman named "Bar" shooting pool.

Samantha Elizabeth McNulty (Bar) testified that she saw Thomas at the Little Rock Cue Lounge on 16 February 1974. She remembered what the man doing on 16 February because that is her birthday. Thomas was still there at 12:30 a.m. On cross-examination, she testified that she could not swear that she had ever seen Thomas before that date, that she does not remember with whom he was playing, and that she does not know anyone named Bill Patrick.

Pru. 0111 Louis testified that she is the mother-in-law of Thomas King and that he was wearing burgundy pants and a dark blue coat on the night of 16 February 1974 and during the next day. She left her house about 9:30 p.m. on 16 February and did not say where he was going.

Pru. Thelma Feny King testified that she is the mother of Thomas King and wife of Joseph King. Joseph had been drinking since Thursday and was intoxicated when Mrs. King went to work Saturday morning, 16 February 1974. Joseph was wearing dark blue trousers and a dark blue shirt. When Mrs. King returned from shopping between 6:00 and 7:00 p.m., Joseph was home alone and was still intoxicated. She read between 7:00 and 10:30 p.m. and then went to bed. Sometime that night she heard noises from inside the building as if someone had fallen, but she did not get up. When she awoke the next morning about 6:30 or 7:00 a.m., she saw her husband on the couch wearing the same clothes and in the same condition as the night before. There were two or three wine bottles around him. The end table near the couch was out of place but she did not notice anything else. She no-

her son in bed in the bedroom, and he explained that he had stayed there for the night because he had no oil at his house and because of his father's condition he did not want to bring his wife and children there. If Thomas was drinking when Mrs. King saw him, she could not tell it. Thomas was wearing burgundy pants, a T-shirt, and jacket, and she noticed no stains on his clothing. Thomas told his mother that he and his father had had a scuffle the night before. In her opinion, when she went to bed about 10:00 or 10:30 the night before, her husband was not able to go anywhere by himself.

Mrs. King further testified that a light blue pair of pants was in her clothes hamper on 17 February 1974 when she put other clothes there but she did not know how long the pants had been there. She noticed that the blue pants had a stain somewhere on the front. She stated that her son Timothy owns these blue pants and that, in her opinion, Thomas could not wear them. She also testified that these pants had been in the hamper since sometime in January 1974.

Timothy Eugene King, brother of Thomas and son of Joseph, testified that he owned the jacket found on the couch and the pair of light blue pants found in the hamper. His blood type is "O", and the stains on both articles of clothing were there when he last saw them in January 1974. The stains were the result of work-related injuries that caused him to bleed and of a blow which he received in the mouth during a fight at which he was a bystander. He further testified that the pants fit him but are too small for his brother Thomas.

On rebuttal the State offered testimony that police officers discovered the blue pants in evidence during the search of the Joseph King residence on 19 February 1974 in a laundry hamper in the bathroom. Analysis of a stain on the right leg of these pants revealed the presence of blood, group "O". Thomas King's blood was found to be group "A".

Attorney General RUFUS L. EDMISTON, Assistant
Attorney General THOMAS E. WOOD and Associate
Attorney ARCHIE W. ANDERS for the State.

FRANK PATTON COOKE for Thomas Lee King, defendant
appellant.

ROBERT H. FORBES for Joseph King, defendant
appellant.

MOORE, Justice.

Joseph King moved for a separate trial and assigns as error the denial of his motion. These defendants were charged in separate bills of indictment with identical crimes. The offenses charged are of the same class, relate to the same crimes and are so connected in time and place that most of the evidence at the trial on one of the indictments would be competent and admissible at the trial on the others. Each defendant relied on an alibi as a defense and their defenses were not antagonistic. Under such circumstances, the trial judge was authorized by G.S. 15-152 (repealed by Sess. Laws 1973, c. 128C, s. 2G, effective July 1, 1975) in his discretion to order their consolidation for trial. State v. Bass, 280 N.C. 435, 186 S.E. 2d 384 (1972); State v. Turner, 268 N.C. 225, 150 S.E. 2d 406 (1966); State v. Hamilton, 264 N.C. 277, 141 S.E. 2d 506 (1965); State v. Morrow, 262 N.C. 592, 138 S.E. 2d 245 (1964).

No statement made by either defendant was admitted which tended to incriminate or prejudice the other defendant. Hence, the rule as set out in Bruton v. United States, 391 U.S. 123, 20 L.Ed. 2d 476, 58 S.Ct. 1620 (1968), as applied in State v. Fox, 274 N.C. 277, 163 S.E. 2d 492 (1968), does not apply.

Defendant further contends, however, that the action of Judge Hasty in consolidating the cases for trial was void because it overruled a prior order entered by Judge Grist, and that one superior court judge cannot overrule an order entered by another superior court judge. It should first be noted that the order of Judge Grist to which defendant refers was entered at a hearing held for the purpose

of settlement). This hearing was held on 13 June 1974 and after hearing a number of witnesses, Judge Crist entered an order denying the motion for allowance of bond for each defendant. He then added that the cases were held for further consideration, and

"That the State has indicated that [it] will probably not proceed in both cases at the same time and only for the defendant, Joe King, Mr. Robert H. Forbes, has indicated he would like it known that the motions not be consolidated for trial."

"It further appearing to the Court that the cases were calendared for trial during the week of June 10, 1974, and that the defendants were ready for trial and that it became necessary that the State move for a continuance because of the absence of private prosecution, Mr. Frank D. Stott, and the court having considered the motion for a bench as a further motion for a speedy trial;

"THE COURT OVERRULES that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Cassier County on July 10, 1974." (Emphasis added.)

At the hearing before Judge Crist on 13 June 1974, no motion for a severance was pending. Such motion was not made until 9 July 1974. Judge Crist never considered this motion, and his order of 13 June only referred to future probabilities. Therefore, Judge Hasty did not overrule Judge Crist. This contention is without merit.

The cases were properly consolidated for trial and the foregoing assignment of error is overruled.

Defendants next contend that the trial court erred in allowing the State to introduce evidence against defendants regarding extraction of blood and hair samples from them and the comparison of blood from defendants and Missouri Davis with exhibits introduced into evidence by the State. Defendants contend that there was no factual basis for allowing these blood samples to be drawn and hair samples taken. There is no merit in this contention.

When the State moved to require defendants to submit to the extraction of blood samples and to furnish hair samples, Judge Snapp, after hearing evidence and arguments of counsel, made findings of fact fully supported by the evidence as follows:

"(1) On 3 February 1957, the defendant, Mr. David Davis, was found by police at his home at 110 St. George Street, Ottawa, Ontario, with a bullet hole in his right temple and another in his left arm.

"(2) Mrs. Davis advised the investigating officers that the defendants unscrewed her and her husband's door knobs and took away a heavy covetable of her type that she used a hammer on a moment that she struck one of the persons she hit him with the hammer.

"(3) Investigating officers found a telegrammatic key in the door hole with nail inside it. Mrs. Davis has advised investigating officers that the key was not her property or her husband's.

"(4) Investigating officers found a cleaver hammer lying near a truck one-half block from Mr. Davis' home. These answers to be elicited from the defendant.

"(5) Mrs. Davis, who is still in the hospital as a result of her injuries, has made a photographic identification of the person seen at the market. She also names this person.

"(6) On 27 February 1957, investigating officer, Major Officer No. 11, Major Warren Daniels, the head of the Criminal Division, Royal Canadian Mounted Police, reported to be headquartered, separate laboratories were also formed on the incident in the house.

"(7) Donald Robinson, a cab driver for Yellow Cab Company, has informed investigating officers that early in the morning after this occurrence the defendant, George Davis, was a passenger in his cab and that the said defendant had apparent bloodstains on his clothing.

"(8) Blood samples from Mr. and Mrs. Davis have been obtained and sent to the State Bureau of Investigation for analysis.

"(9) Samples of stain on the hammer and clothing have been sent to the State Bureau of Investigation for analysis. Mr. the Bureau has advised investigating officers that the reading are blood.

"(10) Mr. defendant, George Davis, has stated to investigating officers that he receives no care at his home which resulted in the bleedstains to his clothing.

"(11) The defendant is not appear to be healthy male, and there is no evidence that either suffers from any disease, sin and, or physical disability which would make reasonable withdrawal of blood deleterious to his health.

"(12) That it is reasonably necessary for the State to procure habeas corpus and liberate prisoner from the defendant and that same will be of material aid in determining whether the defendant committed the offence charged."

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Determining further content, however, left defendant's counsel here a right to be present when the blood samples were taken, for upon this fact two points may arise that are crucial here. Inasmuch that counsel is permitted to examine all evidence having to do with the formation of blood samples he has the opportunity of comparing these samples with each other as well as comparing them with such samples as those of clothing and other objects of persons, and also with the samples of the victim.

For more information, contact the National Bureau of Economic Research.

(2) The amount of time it takes to obtain the information will be
dependent entirely upon the number of questions, and the number
which have to be answered from which questions will
vary as said trust may receive or decline to answer
any particular question.

(3) That counsel was not present during the taking of these statements at Revere, 1974.

(3) That annual fee shall consist of one-half the amount of the annual fee paid by the member to the State.

(1) That all medical officers "contribute to their studies by the hospitals during the entire course of their clinical career, they consider that students' services ought to be given before graduation, to furnish them with the latest methods of diagnosis and treatment."

(3) This would mean that the time constant of the decay would be proportional to the square of the initial concentration.

(c) That the court indicated, should it be the desire of defense counsel, that it trial order the blood witness be removed from the courtroom, and another one called to take his place. It was further agreed that the defense attorney would be allowed to leave the courtroom during the time the blood witness was being questioned.

thus, caused for defalcations, by their failure to examine
with the proper care taken out to request further fiscal taxes,
obligatorily subject to the right of every loan or operation, even without

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such waiver their argument here would be unavailing, for as we said in State v. Wright, 274 N.C. 84, 90-91, 161 S.E. 34 501, 507 (1960):

*The authorities hold, however, that handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and outside the protection of the Fifth Amendment privilege against self-incrimination. Schneber v. California, 384 U.S. 757, 16 L. Ed. 2d 905, 381 U.S. Ct. 1024; Gilbert v. California [388 U.S. 263, 16 L.Ed. 2d 1171, 37 U.S.Ct. 1951 (1967)]; P. F. v. Wade [380 U.S. 218, 16 L.Ed. 2d 1149, 37 U.S.Ct. 1926 (1967)]; State v. Garfield, 256 N.C. 652, 124 S.E. 2d 873; Annotation: Accused's Right to Counsel under the Federal Constitution, 16 L. Ed. 2d 1426. Such pretrial police investigating procedures are not of such a nature as to constitute 'critical' stages at which the accused is entitled to the assistance of counsel guaranteed by the Sixth Amendment and made obligatory upon the states by the Fourteenth Amendment. Gideon v. Wainwright, 373 U.S. 335, 9 L. Ed. 2d 799, 38 U.S.Ct. 731; Washington v. Illinois, 373 U.S. 476, 12 L. Ed. 2d 977, 64 U.S.Ct. 1780; Pointer v. Texas, 393 U.S. 400, 13 L. Ed. 2d 923, 85 U.S.Ct. 1000.

* * *

This assignment is overruled.

Defendants next contend that the trial judge erred in finding Bryan Stirball (in the field of blood typing), W. G. Layton, Jr. (in the field of fingerprint identification and comparison), Laura Ward (in the field of forensic serology), Dr. Eugene Rutland, Jr. (in the field of pathology), and Steve Jones (in the field of fingerprinting) to be experts in their respective fields and that, in announcing his findings in the presence of the jury, the judge expressed an opinion regarding the credibility of these witnesses contrary to G.F. 1-1f0.

Defendants further contend that the trial judge erred by reemphasizing these findings in his charge to the jury by stating that "an experienced fingerprint analyst of the North Carolina Bureau of Investigation and his supervisor" testified in behalf of the State. These contentions are without merit. Our cases have consistently held:

*Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . .

"(t) finding in the trial judge that the witness passenger the defendant still will not be剖解
on appeal because there is no evidence to support it.
... . . . I believe it is C. Evidence § 133 (General
Laws, 1970), and case therein cited.

The evidence with respect to the qualifications of each witness fully supports the findings and it is quite obvious that the rulings finding those witnesses to be experts in their respective fields could not have been understood by the jury as anything other than rulings upon the qualifications of the witnesses to testify as to their opinions. . . . It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. . . ." State v. Frazier, 200 N.C. 151, 155, 113 S.E. 2d 621, 628 (1952).

The statement in the charge to which defendant now objects was made by the trial judge in recapitulating the State's evidence and was fully supported by the testimony concerning the training and experience of those two witnesses. If defendant at the time deemed this statement to be inaccurate, he should have called the error to the trial judge's attention then and there in order to give him an opportunity to correct it. His failure to do so waived whatever error, if any, there might have been. State v. Henderson, 229 N.C. 1, 202 S.E. 2d 50 (1973); State v. Noell, 284 N.C. 670, 197 S.E. 2d 720 (1953); Berry v. Jerry, 206 N.C. 77, 147 S.E. 2d 321 (1965); State v. Cornelius, 261 N.C. 452, 144 S.E. 2d 200 (1953); Steelman v. Jenkins, 226 N.C. 651, 46 S.E. 2d 101 (1945); Manufacturing Co. v. L. & P., 223 N.C. 734, 29 S.E. 2d 22 (1945). This assignment is overruled.

Defendant assigns as error the action of the trial court in admitting into evidence the hammer found by officers some distance from the scene of the crime and at a later time, and in permitting the testimony by witness with relation thereto. The hammer was found 500 feet from the door area of the Davis home lying under a

burn truck at approximately 1:15 p.m. on 17 February 1974. Defendants contend that it was so remote from the commission of the crime both by distance and time that it was inadmissible.

Mrs. Davis testified that the hammer introduced into evidence was similar to the one with which Joe King hit her. Blood found on the hammer was group "O" as was the blood of Mrs. Davis.

Any object which has a relevant connection with the case is admissible in evidence and weapons may be admitted when there is evidence tending to show that they were used in the commission of the crime. 1 Stansbury's N.C. Evidence § 118 (Brandis Rev. 1973); State v. Patterson, 284 N.C. 190, 200 S.E. 2d 10 (1973); State v. Muse, 220 N.C. 31, 105 S.E. 2d 214 (1971); State v. Snedden, 274 N.C. 490, 164 S.E. 2d 100 (1960). The testimony of Mrs. Davis that the hammer was similar to the one used to hit her was sufficient identification for the purpose of introducing it into evidence. State v. Bass, supra; State v. Patterson, supra; State v. Fox, 277 N.C. 1, 17 S.E. 2d 561 (1970); State v. Macklin, 210 N.C. 490, 107 S.E. 705 (1936).

The lapse of time occurring between the crime on 16 February and the discovery of the hammer nearby on 17 February was not a significantly long period. This lapse of time and the distance from the scene of the crime to where it was found would not render the evidence incompetent but would only affect its probative force. 227 C.J.S., Criminal Law § 712 (1961); State v. Brown, 289 N.C. 590, 187 S.E. 2d 85 (1972); State v. Payne, 210 N.C. 719, 107 S.E. 573 (1935); State v. Macklin, supra. See State v. Woods, 226 N.C. 612, 213 S.E. 2d 214 (1975). This assignment is overruled.

Defendants next contend that the trial court erred in several instances in failing, upon general objection, to instruct the jury that certain evidence was to be considered against only one of the defendants and that such evidence was incompetent as to the other. Defendant Thomas King contends that it was error to fail

instruct that no one of the officers' answers and the trial judge's summing up of the court's view of the evidence from the defendant's evidence, by whom he admitted that he had been the author of the destruction, would have been more favorable to the court's finding than the account of Joseph King's residence we will give them as antecedent shows. None has given more direct evidence of the taking and analysis of the blood of Joseph King. Defendant does not deny that he was under oath at the time he could have given corroborative or "tacit" evidence of his own taking and残忍地 evidence of comparison of fingerprints lifted from the state house and fingerprints of the victim. In support of his contention, he quotes city attorney, Franklin C. Hale, 503, 202, p. 229 (1901). Defendant relies on it in response.

Franklin, made a trial for former and unknown which, as far as can be told, were conducted for trial. The other two officers, Captain C. W. Ladd, Major G. W. Edwards, told that they knew Mr. Franklin gave his true confession and told him to get it backed, and that Franklin wrote the check to Ladd's house. He wanted a new trial, holding that the statement of Ladd to officers was inaccurate to Franklin, and that the trial of Franklin, prior to this, was defective, which I object to, restrictive instructions. In the present case, none of the evidence of the State differs against our defendant different from that the other in the same charge, and a statement made by another defendant was introduced. Hence, Franklin does not apply.

It is clear that the interpretation of an *out-of-focus* reading of one constituent disjoint from others, the other entities remaining, even over a local region, to a remarkable interaction. That is, if the constraint the reading of the constituent implies the other does not justify and is thus not available for comprehension, a restrictive interpretation is not sufficient; rather, the *out-of-focus* constituent is entitled to a partial,

Bruton v. United States, supra; State v. Fox, 271 N.C. 277, 162 S.E. 274 (1951). It appears here presented with a different situation in which my statement of either defendant implicating the other was admitted in evidence. Here, on several occasions when defendants specifically objected and requested restrictive instructions, the trial judge, in an abundance of caution, gave such instructions. He cannot discern how the trial judge could on other occasions, upon general objections, understand that he was being asked to give restrictive instructions, especially when such evidence in no way implicated the objecting defendant. This assignment is overruled.

The trial judge instructed the jury: "By law, any killing of a human being by a person committing or attempting to commit robbery with a dangerous weapon . . . is first degree murder, punishable by death."

Defendant argues an error the failure of the trial judge to define the word "attempted." In State v. Coddin, 207 N.C. 216, 147 S.E. 2d 803 (1966), we said:

" . . . It is not to be assumed that the jurors were ignorant and the words, 'annoyn, molest and harass,' are in such general usage and so well understood by the average person that it would have been a waste of time to define them. Had the defendant thought their definition of sufficient importance to request it, it is quite likely that the court would have defined them but the failure to make such request waives any possible error. S. v. Coddin, 207 N.C. 249, 189 S.E. 91; S. v. Holloman, 216 N.C. 616, 6 S.E. 2d 217."

And, in State v. McNeely, 242 N.C. 727, 94 S.E. 2d 653 (1950), we said:

" . . . While the judge did not define in detail what is meant by 'an attempt to commit robbery,' the language used is consonant with ordinary meaning of the word attempt, and is clearly understandable. S. v. Jones, 227 N.C. 492, 47 S.E. 2d 465. . . ."

Under this same assignment defendants contend that the trial judge erred in his instruction to the jury regarding the evidence by failing to state all the evidence favorable to the defendants. G.S. 1-117 requires the trial judge to apply the law to the

various facts, situations narrated in the evidence. State v. Accord, 36 N.C. 782, 150 N.C. 262 (1895). The judge is not required to recite all the evidence. He is only required to state the evidence necessary to explain the application of the law to the parties. The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in due time to afford opportunity for correction. State v. Henderson, supra; State v. Moell, supra. A party desiring further elaboration on a particular feature of a case may aptly tender request for further instructions. State v. Moell, supra; State v. Cuffey, 250 N.C. 212, 114 S.E. 2d 17 (1951).

In the present case, to reinforce that the jury understood that he was not summarizing all the evidence, the trial judge stated:

"Members of the Jury, I did not attempt to summarize all of the evidence in this case. I only referred, as I realized, to certain of the evidence offered by the State and the defendant's case to you. You will note I use this phrase, 'tends to show'. I did this because what, if anything, the evidence does show, is for you as the fact to determine. I only referred to such of the evidence as I deemed necessary to explain and apply the law in the case. All of the evidence is before you and you are not to understand that I am emphasizing any part of the evidence over and against any other part of the evidence. All of the evidence is important and it is your duty to remember it all, consider it all and weigh it all in arriving at your verdict in this case. Therefore, if your recollection of what the evidence was differs from that of the District Attorney or counsel for the State and counsel for the defendants or even the Court says it was, you will rely and be governed entirely on solely upon your own recollection of what the evidence was in this case."

An examination of the charge discloses that the judge complied with the statutory requirement of G.S. 1-111. This assignment of error is overruled.

An examination of the entire record discloses that defendant received a full and fair trial, free from prejudicial error.

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA No 1 Error.

*Wm. Legg, Clerk
I. Davis " 15*

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

JUL 10 1975
IN THE CLERK'S OFFICE OF THE SUPREME COURT OF NORTH CAROLINA

FILED

STATE OF NORTH CAROLINA

v.

From Gaston

Thomas Lee King

ORDER FOR STAY OF EXECUTION

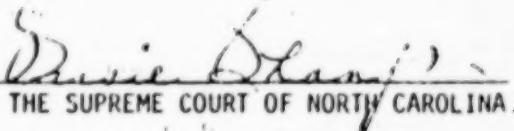
Petition having been filed by the defendant above named, through his attorney, Frank P. Cooke of Gastonia, North Carolina, for a stay of execution of the judgment and death sentence rendered by the Honorable Fred Hasty during the July 15, 1974 criminal session of Gaston County Superior Court, which judgment upon appeal was affirmed by the Supreme Court of North Carolina in its opinion filed June 26, 1975, execution being scheduled on the third Friday following the filing of the opinion, which is July 11, 1975, and the defendant, by his counsel, having stated his intention to file a petition for writ of certiorari in the United States Supreme Court;

NOW, THEREFORE, it is ordered that execution of the judgement be and the same is hereby stayed pending further orders of this court.

It is further ordered that the defendant remain in the custody of the Director of the Department of Correction pending further orders of this court.

It is further ordered that a certified copy of this order be served on the warden of Central Prison, Raleigh, North Carolina.

This the 10th day of July, 1975.


CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA.

Served by delivering a certified copy of this order to Mr. Sam
Garrison, Warden of Central Prison, at Raleigh, North Carolina at 4:35 P.M.
this 10th day of July, 1975.

MARSHAL, SUPREME COURT OF NORTH CAROLINA

cc: The Honorable James E. Holshouser, Jr.

✓Mr. Frank Patton Cooke, Attorney at Law

Mr. Jacob L. Safron, Assistant Attorney General

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

DEPUTY CLERK

By John C. Gandy, Deputy Clerk
11 July 1975

Supreme Court of the United States

No. A-256 October Term 1975

THOMAS LEE KING AND JOSEPH LEE KING,

Petitioners

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

November 24 , 19 75

/S/ Warren E. Burger

Chief Justice of the United States.

Dated this 26
day of September , 19 75